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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1272

GEORGIA POWER COMPANY,
Petitioner,

vs.

CIMARRON COAL CORPORATION,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Respondent's Brief in Opposition to Writ of Certiorari raises for the first time two procedural issues.

1.

Whether the Petition for Certiorari met the procedural prerequisites for jurisdiction of this Court.

Respondent notes on page 1 of its brief that the Petitioner did not file with the Court of Appeals for the Sixth Circuit either a Petition for Rehearing or a Motion to Stay the Mandate. It is clear that a Petition for Rehearing to the Court of Appeals pursuant to Rule 40, Federal Rules of Appellate Procedure, is permissive and is not a jurisdictional prerequisite to filing a Petition for Writ of Certiorari. 28 U.S.C. §2101; Rule 21, Rules of the Supreme Court of the

United States; 9 Moore's Federal Practice, ¶201.01[3], pp. 518-20 and ¶201.04, pp. 521-22. The only significance of filing a Petition for Rehearing to the Court of Appeals is to extend the time within which a Petition of Certiorari must be filed with this Court. *Id.* A Motion to Stay the Mandate pursuant to Rule 41, Federal Rules of Appellate Procedure, is also permissive and not a jurisdictional prerequisite for a Petition for Writ of Certiorari in this Court. 28 U.S.C. §2101(c); Rule 21, Rules of the Supreme Court of the United States, 9 Moore's Federal Practice, *supra.*

A Motion to Stay the Mandate in the Court of Appeals was not necessary or appropriate in the instant case, because the Court of Appeals affirmed the trial court's judgment, which maintains a status quo order in effect pending a final determination of the merits of the case on appeal. (Pet. A14-A20; A21; A23). The judgment affirmed by the Court of Appeals, therefore, is effectively stayed pending a final disposition of the case on Petition for Writ of Certiorari by this Court, thus avoiding any possibility of mootness, as suggested on page 2 of Respondent's Brief in Opposition.

2.

Whether the Respondent waived any right to Petition for Certiorari.

Respondent urges this Court to consider issues not raised by the Petition for Writ of Certiorari and offers an apology for failing to file a "cross-petition" as to such other issues. Respondent had the opportunity to petition this Court for Writ of Certiorari in a time and manner provided by law, 28 U.S.C. §2101, and by the

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Rules of this Court, Rules 19-27. There is no merit in Respondent's characterization that the specific issues raised in the Petition for Writ of Certiorari are "equitable" principles as opposed to the "legal" defense urged by Respondent of recision of the contract because of a prior breach by the Petitioner. Naturally, upon granting the Petition for Writ of Certiorari, this Court can determine the issues and scope of review it deems appropriate under the applicable facts and law of the instant case.

Respondent's random references to facts and argument regarding its defense of recision are misplaced and have no bearing on the urgency and necessity of this Court accepting review of the instant case on the grounds set forth in the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Reply to Brief in Opposition to Writ of Certiorari upon counsel for Respondent by depositing same in the United States Mail with adequate postage thereon in envelopes addressed as follows:

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This day of April, 1976.

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